HONG HOCK TRADING CO

v.

CARSENG MANUFACTURING (M) SDN BHD

HIGH COURT MALAYA, IPOH
BALIA YUSOF JC
[CIVIL SUIT NO: 22-66-99]
27 DECEMBER 2002

CIVIL PROCEDURE: *Appeal - Appeal from registrar - Whether s. 3 Courts of Judicature Act 1964 applies to civil appeals from registrar to judge-in-chambers - Decision of registrar dismissing application for summary judgment - Whether a final or interlocutory decision - Whether appealable*

CIVIL PROCEDURE: *Summary judgment - Appeal against dismissal of application for - Whether decision of registrar dismissing application appealable - Whether decision of registrar interlocutory or final - Definition of appealable decision - Courts of Judicature Act 1964, s. 3*

This was an appeal by the plaintiff against the decision of the registrar dismissing its application to enter summary judgment. At the outset of the hearing the defendant raised the preliminary objection that the said 'decision' of the registrar was not appealable as it was not a judgment, sentence or order which finally disposed of the rights of the parties within the meaning of s. 3 of the Courts of Judicature Act 1964 ('CJA'). The central issue that fell for determination was whether s. 3 of the CJA, which applies in respect of criminal appeals, also applies in respect of civil appeals from the registrar to the judge-in-chambers.

Held:

[1] Section 3 of the CJA applies in respect of civil appeals from the registrar to the judge-in-chambers. (Following *Teoh Poh Keong Sdn Bhd v. Shinhan Engineering & Construction Co Ltd* [2001] 2 CLJ 440 HC and distinguishing *Tycoon Realty Sdn Bhd v. Senwara Development Sdn Bhd* [1999] 3 CLJ 377 CA.) (p 331 e-f)

[2] The 'decision' of the registrar dismissing the plaintiff's application for summary judgment was one that was 'interlocutory' in the sense that it did not deal with the final rights of the parties and finally determine the principal matters in dispute. Consequently, the 'decision' did not

come within the meaning of s. 3 of the CJA and was thus not appealable. The plaintiff's appeal was therefore incompetent. (pp 330 h & 332 e-g)

[Defendant's preliminary objection upheld; plaintiff's appeal struck off.]

Case(s) referred to:

Alexander John Shek Kwok Bun v. WAB Keluarga Realty Sdn Bhd [2002] 1 CLJ 480 ***(refd)***

Dato' Seri Anwar Ibrahim v. PP [1999] 1 CLJ 537 ***(refd)***

Kee Yeh Maritime Co Ltd v. Coastal Shipping Sdn Bhd [2001] 5 CLJ 194 ***(foll)***

Rank Xerox (Singapore) Pte Ltd v. Ultra Marketing Pte Ltd [1992] 1 SLR 73 ***(foll)***

Seabance Ge Capital Sdn Bhd lwn. Dynabuilders Sdn Bhd [2001] 1 LNS 98 ***(refd)***

Teoh Poh Keong Sdn Bhd v. Shinhan Engineering & Construction Co Ltd [2001] 2 CLJ 440 ***(foll)***

Tetuan J & S Holdings Sdn Bhd v. A Karim Hassan [2000] 4 CLJ 152 ***(refd)***

Tuan Hj Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd [1996] 1 CLJ 241 ***(refd)***

Tycoon Realty Sdn Bhd v. Senwara Development Sdn Bhd [1999] 3 CLJ 377 ***(dist)***

Legislation referred to:

Court of Judicature Act 1964, ss. 3, 29

Rules of the High Court 1980, O. 14

Subordinate Courts Rules 1980, O. 26A

For the plaintiff/appellant - Suhairi Shukor; M/s Chong & Poh

For the defendant/respondent - Chuah Teong Wah; M/s Jaswant & Loh

[Editor's note: For a recent decision on the interpretation of s. 3 of the CJA, please see also the judgment of Abdul Aziz Mohamad J in Sitrac Corporation Sdn Bhd v. Lim Siew Eng [2002] 4 CLJ 463.]

[The plaintiff has filed an appeal to the Court of Appeal vide Appeal No: A-02-924-02.]

Reported by Gan Peng Chiang

JUDGMENT

Balia Yusof JC:

This is an appeal by the appellant/plaintiff against the decision of the learned registrar made on 20 February 2002 dismissing the appellant's application for summary judgment under O. 14 of the Rules of the High Court 1980. The learned registrar ruled that there are triable issues in the matter and the matter ought to go for trial. The appellant's/plaintiff's application was dismissed with costs.

At the commencement of the hearing of this appeal, the learned counsel for the respondent/defendant raised a preliminary objection stating that the appeal is incompetent in the light of the meaning of the word 'decision' in s. 3 of the Court of Judicature Act 1964 (hereafter referred to as the CJA). It was contended by the respondent that the rights of the appellant has not been finally determined by the decision of the registrar. In other words the decision of the registrar has not finally determined the rights of the parties. The case is still pending in court and awaiting full trial. Such being the situation, it was submitted that the matter is not appealable and the appeal brought by the appellant is therefore incompetent and ought to be dismissed accordingly.

The learned counsel of the appellant on the other hand submitted that s. 3 of the CJA does not apply to civil appeals and cited the case of *Tycoon Realty Sdn Bhd v. Senwara Development Sdn Bhd* [1999] 3 CLJ 377. Counsel further submitted that based on the principle of *stare decisis* this court is bound by the said decision of the court of appeal. It is also the contention of the appellant that an appeal is by way of re-hearing and as such this court in hearing the appeal must treat it as though it comes before it for the first time and the judge is not confined to the points taken before the registrar.

The issue before me is whether the decision of the registrar is appealable.

It would be pertinent at this stage to reproduce s. 3 of the CJA on the meaning of the word 'decision' which states:

> 'decision' means judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties.

This definition of the word 'decision' was explained by NH Chan JCA in *Dato' Seri Anwar Ibrahim v. PP* [1999] 1 CLJ 537 at p. 549 as follows:

> This new definition of 'decision', as in the amendment, does not include a judgment or order which does not deal with the final rights of the parties on the matters in dispute. In other words what has been excluded from the meaning of the 'decision' is the type of judgments and orders which is termed 'interlocutory'.

and at p. 549 His Lordship went further to state:

> Shortly stated, what the amendment means is that a judgment or order which does not deal with the final rights of the parties, but is made pendente lite, and gives no final decision on the matters in dispute, is not a 'decision' within the meaning of that word in the current version of s. 3 of the Act, and therefore is not appealable.

On the meaning of final decision, VT Singam JC (as he then was) in *Tetuan J & S Holdings Sdn. Bhd. v. A Karim bin Hassan* [2000] 4 CLJ 152 at pp. 160-161 said:

> It is the view of this court that in order to determine whether an order or decision is final, that order or decision must have determined the principal matter before the court thereby having concluded the main dispute and consequently, does not require further hearing or decision of the case to be made by the court on the whole of the proceedings. In other words, the order or decision should not have dealt with the final rights of the parties on the subject matter in dispute which means, it is not conclusive of the main suit. In such a situation, the order or decision is not appealable within the meaning of the word 'decision' as defined in Section 3 of the Courts of Judicature Act 1964.
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> On the other hand, if the order or decision finally disposes of the principal matter or the subject matter in dispute thereby bringing a conclusion to the whole of the proceedings without further date of hearing, it is the view of this court that the order or decision in those circumstances is appealable.

Again in *Dato' Seri Anwar Ibrahim v. Public Prosecutor (supra)* on the distinction between final judgments and orders and interlocutory judgments and orders at p. 549, this is what His Lordship NH Chan JCA has to say:

> In general, a judgment or order which determines the principal matter in question is termed 'final': see *26 Halsbury's Laws of England*, para 505 on p. 238. Actually, the use of the term final is tautological as all judgments or orders are final. The term (final) is used for the purpose of distinguishing between judgments and orders and 'interlocutory' judgments and orders. The difference is that judgments and orders which are not termed 'interlocutory' judgments and orders are appealable under the new meaning of the word 'decision' as defined in s. 3 by the 1988 amendment. In other words, judgments and orders which determine the principal matter in question are termed final judgments and orders and they are appealable. But, those judgments and orders which give no final decision on the matters in dispute (which are termed 'interlocutory' judgments and orders) are now no longer appealable.

A number of authorities has been cited by the learned counsel for the respondent in support of his contention and in particular the authorities which deal squarely with the same issue brought by the appellant in the

present case. In *Seabance Ge Capital Sdn Bhd lwn. Dynabuilders Sdn Bhd* [2001] 1 LNS 98 and *Alexander John Shek Kwok Bun v. WAB Keluarga Realty Sdn Bhd* [2002] 1 CLJ 480 the court held that the decision of the learned Sessions Judge dismissing an application for an order under O. 26A of the Subordinate Courts Rules 1980 is not appealable on the grounds that such decision does not come within the meaning of 'decision' under s. 3 of the CJA. And the cases of *Kee Yeh Maritime Co Ltd v. Coastal Shipping Sdn Bhd* [2001] 5 CLJ 194 and *Teoh Poh Keong Sdn Bhd v. Shinhan Engineering & Construction Co Ltd* [2001] 2 CLJ 440 of which both are decisions of Richard Malanjum, J (as he then was) also summarise the issue on what is appealable and what is not within the meaning of the word 'decision' as defined in s. 3 of the CJA.

At p. 197 h, His Lordship in *Kee Yeh Maritime Co Ltd v. Coastal Shipping Sdn Bhd (supra)* quoted a passage from the judgment of *Yong Pung How CJ in Rank Xerox (Singapore) Pte Ltd v. Ultra Marketing Pte Ltd* [1992] 1 SLR 73 at p. 75 as thus:

> Previously, there were two possible tests to be applied in deciding whether an order was interlocutory or final. The first was stated by Fry LJ in *Salaman v. Warner* [1891] 1 QB 734 at p. 736:
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> > ... an order is 'final' only where it is made upon an application or other proceeding which must, whether such application or proceeding fail or succeed, determine the action. Conversely, ... an order is 'interlocutory' where it cannot be affirmed that in either event the action will be determined.
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> The second was the test stated by Lord Alverstone in *Bozson v. Altrincham UDC* [1903] 1 KB 547 at p. 548. This test was as follows:
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> > Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then ... it ought to be treated as a final order; but if it does not, it is then ... an interlocutory order.
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> In *Ratnam v. Cumarasamy & Anor* [1962] MLJ 330 the Court of Appeal of the Federation of Malaya carefully considered the available authorities and held that the proper test to be applied in deciding whether an order was interlocutory or final ought to be Lord Alverstone's test in *Bozson*'s case. The point was also discussed by the Federal Court in *Nagappa Rengasamy Pillai v. Lim Lee Chong* [1968] 2 MLJ 91. There, without adverting to any test, an order for conditional leave to defend was referred to as 'manifestly an interlocutory order for the simple reason that it was not a final judgment'. So far as courts in Singapore are concerned, the debate ended with *Tee Than Song Construction Co Ltd v. Kwong Kum Sun Glass Merchant* [1967] 2 MLJ 205, a decision of the Federal Court in

Singapore, in which after due consideration of the authorities it was decided that Lord Alverstone's test should be adopted. It should be noted that in *Haron bin Mohd Zaid v. Central Securities (Holdings) Bhd* [1982] 2 MLJ 94, the Privy Council, while expressing its reluctance to overrule the domestic courts of common law jurisdictions outside the United Kingdom in matters of procedure as distinct from substantive law, went on to approve the application of the Bozson test in Malaysia.

Counsel for the plaintiffs contended that the reasons for the decision in *Nagappa Rengasamy Pillai v. Lim Lee Chong* were not clearly stated in that case and that the Federal Court had not applied Lord Alverstone's test in coming to the conclusion that an order for conditional leave to defend an action was an interlocutory order. Whether or not we concur with this submission does not affect our final decision because we should have agreed with the result in that case in any event: applying Lord Alverstone's test still leads us inexorably to the conclusion that an order for conditional leave to defend an action must be an interlocutory order. Counsel for the plaintiffs also contended that an order for conditional leave to defend is a final order in that it finally states the rights of the parties thus the defendant can only defend if he satisfies the condition attached to the order granting leave; otherwise the plaintiff is entitled to judgment. This argument appeared to us to be fallacious.

In our judgment the phrase 'the rights of the parties' contained in the *Bozson* test refers to the substantive rights in dispute in the particular action in which the application for summary judgment is made. When conditional leave to defend the action is given, then so long as the defendant complies with the condition, he has the right to a full trial on the merits, at which later time the substantive rights of the parties will de determined. All that the order for conditional leave decides is the condition subject to which the dispute on the substantive rights is allowed to proceed to trial. It does not decide any part of the substantive rights themselves.

At p. 199 b His Lordship concludes:

Based on principle enunciated in the aforementioned cases it is therefore obvious that in the instant case the ruling of the learned SCJ granting the respondent/defendant unconditional leave to defend the action is only an interlocutory order. It is not therefore a decision as defined under s. 3 of the Act. And as it is my view that there has to be a decision first before the appellate civil jurisdiction of the High Court may be exercised this present appeal is therefore incompetent.

Applying the principle enunciated in the above passages, I have no hesitation in concluding that the decision of the registrar in dismissing the appellant's/plaintiff's application for summary judgment under O. 14 of the Rules of the High Court 1980 is interlocutory in nature.

It is contended by the learned counsel for the appellant that the present appeal is against the decision of the registrar and such an appeal is by way of rehearing and this court ought to treat the matter as though it comes before this court for the first time. This court is therefore not confined to the points taken before the registrar. This argument is brought about in an apparent reference to the decision of the Federal Court in *Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Berhad* [1996] 1 CLJ 241. The learned counsel further submits that s. 29 of the CJA empowers this court to hear the appeal by way of a hearing and have the like powers and jurisdictions on the hearing of appeals as the Court of Appeal has on the hearing of appeals from the High Court. While I am certainly in agreement with the above contention, it is my view that the hearing of an appeal under s. 29 of the CJA presupposes the very existence of an appeal and such an appeal can only exists if there is a right to appeal. If there is no right to an appeal, the appeal is certainly not before this court and the question of hearing it by way of rehearing or otherwise will not arise. If the decision of the registrar is not appealable, it follows that the appeal before me is incompetent and accordingly s. 29 of the CJA has no application.

It was also contended by the appellant's counsel that on the authority of the Court of Appeal's decision in *Tycoon Realty Sdn Bhd v. Senwara Development Sdn Bhd* [1999] 3 CLJ 377, s. 3 of the CJA does not apply to civil appeals and this court, based on the doctrine of *stare decisis* is bound by the said decision. While I humbly agree that this court is bound by the decisions of the Superior Courts, like my other learned brothers in *Teoh Poh Keong*'case, *Seabance* case and *Alexander John Shek Kwok Bun*'s case, I seek to distinguish *Tycoon Realty* with the present appeal before me and in doing so, I can do no better than to quote a passage from His Lordship Richard Malanjum's J (as he then was) judgment in *Teoh Poh Keong Sdn Bhd v. Shinhan Engineering & Construction Co Ltd (supra)*, where at p. 446 f the following were said:

> On the other hand I am well aware of what the Court of Appeal opined in the case of *Tycoon Realty Sdn Bhd v. Senwara Development Sdn Bhd* [1999] 3 CLJ 377. However there the court was concerned with a specific provision only applicable to that court. Indeed s. 67(1) of the CJA states:
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> > The Court of Appeal shall have jurisdiction to hear and determine appeals from **any judgment or order** of any High Court in any civil cause or matter, whether made in the exercise of its original or of its appellate jurisdiction, subject nevertheless to this or any other written law regulating the terms and conditions upon which such appeals shall be brought. (emphasis added)

As may be noted the word 'decision' is not in the company of the words 'judgment or order' in the said section. His Lordship NH Chan JCA at p. 382 of the case in fact mentioned that:

> *It is to be noted that the word 'decision' is not used in s. 67(1), so that, there is no compelling reason to refer to s. 3 of the Act for its meaning as is in the case of criminal appeals.* That be so, the Court of Appeal has jurisdiction to hear appeals 'from any judgment or order of any High Court in any civil cause or matter, whether made in the exercise of its original or of its appellate jurisdiction'. The phrase 'from any judgment or order' is not to be restricted to the meaning given the word 'decision' in the current version of s. 3. This is because, in s. 67, civil appeals to the Court of Appeal are from 'any judgment or order' of any High Court, whereas, in the case of criminal appeals they are against 'any decision' made by the High Court. There is no compelling reason to extend the meaning of the words 'any judgment or order' to mean a judgment or order which would finally dispose of the rights of the parties. It is not the business of a court of law to put words into a statutory provision which are not there because to do so would be intruding into the domain of the legislature. (emphasis added)

Turning to the case before me, the appeal, as stated at the beginning of my judgment is against the decision of the registrar dismissing the respondent's application for summary judgment under O. 14 of the Rules of the High Court 1980. Such decision in my view does not give a final decision on the matters in dispute. The order made by the learned registrar does not deal with the final rights of the parties on the matters in dispute. What the learned registrar ordered merely disposes off an interlocutory matter and the suit proper is yet to be litigated and is still awaiting trial. The rights of the parties can only and will only be determined at the conclusion of the trial before the court when it will finally be determined whether the applicant's claim against the respondent will be allowed or not. As such I hold that the said decision of the learned registrar is not appealable. The preliminary objection raised by the respondent is upheld and this appeal is accordingly struck off with costs.